

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: June 22, 2001
Defendants.)	

REPLY BRIEF OF UNITED STATES IN SUPPORT OF MOTION
FOR PRODUCTION OF DOCUMENTS RESPONSIVE
TO SUBPOENA *DUCES TECUM* ON OR BEFORE JUNE 15

I
INTRODUCTION

The purpose of the government's Rule 17(c) subpoena is to ensure that the United States has gotten all relevant documents and materials to which it is entitled in trying this case. The United States does not believe it has gotten all relevant documents and materials to which it is entitled. That is why the government now seeks to issue a Rule 17(c) subpoena. (A concern about withheld documents is also what prompted a second grand jury subpoena being served upon Martin News Agency, Inc., on June 30, 1999.)

II
LAW AND ARGUMENT

A. THE UNITED STATES BELIEVES THAT DEFENDANTS HAVE DOCUMENTS
RESPONSIVE TO SUBPOENA PARAGRAPH IX, NUMBERS 1 THROUGH 7

The government's Rule 17(c) subpoena is a good faith effort to obtain relevant documents for use at trial. The documents called for in Paragraph IX, numbers 1 through 7 of the subpoena will show the customers and geographic areas serviced by the defendants, as well as

communications between the defendants and two of their competitors in the Dallas/Ft.Worth and surrounding areas. The United States has reason to believe that the defendants have these documents in their possession, custody or control.

In particular, the United States continues to be amazed at the lack of production of any relevant dealer or account records, i.e., hard copy or computer records showing each of the customers (and their locations) to whom Martin News sold magazines and other periodicals. Typically, in the magazine distribution industry, a magazine wholesaler's dealer records identify on a monthly basis each customer by name, address, store number, and sales volume. To date, the defendants have failed to produce any dealer or account records for any period of time between the charged conspiratorial period of August 1990 through October 30, 1995. Instead, in response to the 1997 and 1999 grand jury subpoenas served on Martin News, the defendants produced nothing more than a static snapshot (a computer printout) showing which customers Martin News serviced on July 26, 1997 -- an irrelevant time period that falls more than 20 months after the charged conspiracy period. This irrelevant customer list (Bate-stamps number MAR0001204-1328) is what the defendants trumpet as having already given us in their brief opposing the government's Rule 17(c) request. Defendants' Joint Response to the Government's Motion for Production of Documents on or Before June 15, 2001, p.3.

Other magazine wholesalers with whom the United States has dealt over the past several years have been able to readily provide this type of information on a month-by-month or customer-by-customer basis, going back several years in time. Witnesses interviewed by the government (including former Martin News employees) also have shaken their heads with disbelief when told that Martin News has not produced any dealer guides. This is because the

dealer and account records that the government continues to seek from Martin News are the blood and guts of a magazine wholesaler's operation. It is inconceivable that Martin News does not, and did not, have responsive dealer records (either in hard copy or computer form -- both of which were specifically requested) when the two grand jury subpoenas were originally issued.

Through its Rule 17(c) subpoena, the government seeks to remedy any oversight on the part of the defendants in producing, among other things, relevant documents like the dealer records of Martin News for the charged conspiracy period. Without these relevant dealer records, which most likely were kept and maintained by Martin News on computer disks or tapes, the United States cannot plot out with any precision the customers (and their locations) that Martin News serviced during the charged conspiracy period.

Likewise, the United States is concerned about the defendants' failure to produce a single shred of Rule 16 discovery materials. The United States long ago complied with its discovery obligations. After doing so, counsel for the United States asked Mike Gibson, counsel for defendant Bennett T. Martin, if the defendants were going to produce any Rule 16 materials. Mr. Gibson responded, yes, the defendants probably would do so. Where is it? And how is it possible that this Rule 16 discovery does not fall within the broad grand jury subpoenas previously served upon Martin News? Again, the government's request to issue the Rule 17(c) subpoena is intended to remedy any game-playing that may be going on with the documents.

**B. DEFENDANTS HAVE THE BURDEN OF PROVING DOCUMENTS
RESPONSIVE TO PARAGRAPH IX, NUMBER 8 ARE PRIVILEGED**

In terms of Phillip Bagnall's exit interview, the mere assertion that it is privileged is not controlling. Nor is it correct for the defendants to suggest that this is an issue that the

government has raised at the last minute. In fact, the government has several times requested defense counsel to explain why Phillip Bagnall's exit interview is being withheld. The United States has never been satisfied with defense counsel's bald assertion that it is privileged. The law on privilege is well established. The defendants, as the party asserting the privilege, have the burden of proof. Hodges, Grant & Kaufmann v. IRS, 768 F.2d 719, 721 (5th Cir. 1985); United States v. Miller, 660 F.2d 563, 570 (5th Cir. Unit B 1982). The United States asks for nothing more than that this court conduct an in camera inspection to determine the validity of the defendants' privilege claim as to Phillip Bagnall's exit interview and related documents.

III
CONCLUSION

Accordingly, the United States respectfully requests that the Court issue an order directing the defendant Martin News to produce all documents responsive to this Rule 17(c) subpoena to the United States' office in Cleveland, Ohio, immediately. This may still afford the United States sufficient time to review the materials in preparation of trial and to raise any issues about the production prior to trial.

Respectfully submitted,

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